

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

CIV. _____

COMPLAINT

Defendants.

THE PARTIES

1. Plaintiff is a resident of Sioux Falls, South Dakota.
2. Defendant Hultgren is a resident of Sioux Falls, South Dakota.
3. Defendant Hultgren Construction is a South Dakota limited liability company with its principal office located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

4. Defendant Boomerang is a South Dakota limited liability company with its principal office located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

5. Defendant CLP is a South Dakota limited liability company with its principal office located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

6. Defendant Olympia is a South Dakota limited liability company with its principal office located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

7. Defendant Legacy is a South Dakota limited liability company with its principal office located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

8. Defendant RISE is a South Dakota corporation with its principal office located at 101 Railroad Avenue, Harrisburg, SD 57032.

9. Upon information and belief, Hultgren is a member-manager of Hultgren Construction, CLP, Olympia, Legacy and Boomerang.

GENERAL ALLEGATIONS

10. On or about November 30, 2016, CLP conveyed to Boomerang via warranty deed certain real property described as the South Half (S1/2) of Lot Nine (9) in Block Twenty-One (21) of J.L. Phillips Addition to the City of Sioux Falls, Minnehaha County, South Dakota ("Copper Lounge").

11. On or about November 30, 2016, Olympia conveyed to Boomerang via warranty deed certain real property described as Lot 8 and the North Half (N1/2) of Lot 9, both in Block 21 of J.L. Phillips Addition to Sioux Falls, Minnehaha County, South Dakota ("Skelly's").

12. The Copper Lounge building and the Skelly's building shared a load-bearing common wall located on the North side of the Copper Lounge building and the South side of the Skelly's building.

13. On information and belief, Legacy hired Hultgren Construction as the general contractor for a new building to be constructed on the site of the now-former Skelly's and Copper Lounge buildings (the "Project").

14. Legacy was the developer for the Project.

15. Hultgren Construction was formed at the urging of Legacy's principals to act as the general contractor for projects in which Legacy acted as the developer.

16. By using a captive construction company in Hultgren Construction instead of hiring a reputable, third-party construction contractor, Legacy was able to cut costs and save substantial amounts of money on its development projects.

17. RISE was the structural engineer for the Project and communicated with Hultgren and Hultgren Construction about the Project.

18. On or about December 2, 2016, Copper Lounge and Skelly's collapsed during the removal process of the load-bearing common wall shared by the two buildings.

19. Prior to the collapse, a family residing in the apartment unit on the top floor of the Copper Lounge building reported to Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy that a large crack had formed in the load-bearing common wall during the ongoing construction and demolition activities.

20. Hultgren knew or should have known the crack impaired the structural integrity of the load-bearing common wall, which created a significant, foreseeable risk the wall would give out and the entire structure would collapse.

21. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy took no action to investigate the crack.

22. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy took no action to ensure construction and demolition activities affecting the load-bearing common wall would be carried out with sufficient safety precautions taken and shoring mechanisms put in place to prevent a collapse.

23. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy took no action to warn or alert those who would be present on-site of the Project to the danger posed by continued construction and demolition activities affecting the load-bearing common wall.

24. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy knew a large crack had formed in the load-bearing common wall prior to the collapse and that no action was taken to investigate the crack.

25. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy knew the structural integrity of the load-bearing common wall was impaired, which created significant, foreseeable risk that the wall would give out and the entire structure would collapse.

26. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy knew that the removal of the load-bearing common wall was being conducted with insufficient safety precautions taken and shoring mechanisms put in place to prevent a collapse.

27. Hultgren, Boomerang, Olympia, CLP, Hultgren Construction and Legacy knew through Hultgren that no action had been taken to warn or alert those present on-site of the Project to the danger posed by continued construction and demolition activities affecting the load-bearing common wall.

28. Hultgren Construction carried on its construction and demolition activities under a trial-by-error mentality.

29. Legacy and Boomerang knew Hultgren Construction carried on its construction and demolition activities under a trial-by-error mentality.

30. Legacy and Hultgren Construction lacked the experience and competency to carry out or otherwise oversee the Project in a reasonable and safe manner.

31. Legacy and Boomerang knew Hultgren Construction lacked the experience and competency to carry out or otherwise oversee the Project in a reasonable and safe manner.

32. Hultgren Construction did not provide its agents, servants, and employees with adequate and sufficient training or safety equipment.

33. Legacy and Boomerang knew Hultgren Construction did not provide its agents, servants, and employees with adequate and sufficient training or safety equipment.

34. Hultgren Construction and Legacy performed demolition work on-site of the Project on the date of the collapse without first receiving permission from the City of Sioux Falls to do so.

35. Hultgren Construction, Legacy, Boomerang, CLP and Olympia performed demolition work on-site of the Project with insufficient safety precautions taken and shoring mechanisms put in place to prevent a collapse.

36. On information and belief, RISE communicated with Legacy, Hultgren and Hultgren Construction regarding the removal of the load-bearing common wall between Copper Lounge and Skelly's, advised Hultgren and Hultgren Construction regarding the shoring mechanism for the wall removal project and was aware said wall was being removed without proper safety precautions having been taken.

37. RISE knew or should have known of the danger of continuing construction and demolition activities on-site of the Project.

38. RISE took no action to warn or alert those who would be present on-site of the Project to the danger posed by continued construction and demolition activities affecting the load-bearing common wall.

39. RISE knew or should have known Hultgren Construction did not have authority from the City of Sioux Falls to perform construction or demolition work on-site of the Project on the date of the collapse.

40. RISE failed to advise Hultgren Construction of the need to obtain proper authority for the continuation of construction and demolition activities on-site of the Project.

41. RISE failed to advise Hultgren Construction of reasonable safety precautions needed to ensure proper support and shoring of the load-bearing common wall was in place prior to and during construction and demolition activities.

42. RISE failed to advise Hultgren Construction to cease continuation of construction and demolition activities affecting the load-bearing common wall.

43. Plaintiff was employed by Hultgren Construction as a construction worker and was working on-site at the Project when the collapse occurred.

44. Plaintiff's older brother, Ethan Thad McMahon, now deceased, was also working on-site at the Project when the collapse occurred.

45. Ethan was trapped inside the collapsing structures and was crushed by falling debris, resulting in his death.

46. Plaintiff was within a few feet of Ethan as the collapse occurred.

47. Plaintiff was himself in an immediate risk of physical harm due to the collapse.

48. Plaintiff witnessed the collapsing structures fall on Ethan, and Plaintiff witnessed Ethan's death.

49. Plaintiff escaped the collapse without physical injury.

50. Plaintiff has suffered, and will continue to suffer, grievous mental and emotional damages caused by witnessing his brother's death.

51. Plaintiff was also exposed to asbestos and directed to remove asbestos from the Project without adequate safety precautions.

COUNT I – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(Defendants Boomerang, CLP, and Olympia)

52. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

53. Plaintiff was a business invitee of Boomerang, CLP, and Olympia while he was on the premises of the Project, which property and premises were owned, controlled, and maintained by Boomerang, CLP, and Olympia at all times material hereto, to wit:

a. Plaintiff was a construction worker who was invited to enter and remain on the premises of the Project by Boomerang, CLP, and Olympia through their agents, servants, and employees.

b. At the invitation of Boomerang, CLP, and Olympia, Plaintiff worked on-site at the Project both before and after November 30, 2016.

c. At the invitation of Boomerang, CLP, and Olympia, Plaintiff worked on-site at the Project on December 2, 2016, up to and including at the time of the collapse.

d. Plaintiff's purpose as a construction worker on the premises of the Project was a purpose directly or indirectly connected with business dealings of Boomerang, CLP, and Olympia, as owners of the premises.

54. Boomerang, CLP, and Olympia, through their agents, servants, and employees, knew or should have known of the presence of a concealed or dangerous condition on the premises that posed an unreasonable risk of harm to Plaintiff and others present on the property.

55. Boomerang, CLP, and Olympia, through their agents, servants, and employees, created and contributed to the concealed and dangerous condition on the premises.

56. Boomerang, CLP, and Olympia, through their agents, servants, and employees, knew or should have known Plaintiff and others present on the property were unlikely to discover, realize, or protect themselves from the concealed or dangerous condition.

57. Boomerang, CLP, and Olympia, through their agents, servants, and employees had the authority, capability, and wherewithal to protect business invitees such as Plaintiff and others present on the property from concealed and dangerous conditions on the premises.

58. Boomerang, CLP, and Olympia, owed Plaintiff the duty of exercising reasonable care of maintaining and securing the premises for Plaintiff's benefit and safety.

59. Boomerang, CLP, and Olympia, owed Plaintiff the duty to protect Plaintiff from witnessing the death of Plaintiff's brother on the premises caused by the negligence of Boomerang, CLP, and Olympia.

60. Boomerang, CLP, and Olympia, through their agents, servants, and employees, breached their duty by failing to keep the premises reasonably safe from concealed or dangerous conditions for the benefit and safety of Plaintiff and others on the property.

61. Boomerang, CLP, and Olympia, through their agents, servants, and employees, breached their duty by failing to warn Plaintiff or others on the property of concealed or dangerous conditions on the premises.

62. As a direct and proximate result of the negligence of Boomerang, CLP, and Olympia, Plaintiff suffered extreme and severe emotional distress from observing the death of his brother Ethan, with such harm manifesting itself in physical symptoms.

COUNT II – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(Defendants Boomerang, CLP, and Olympia)

63. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

64. Boomerang, CLP, and Olympia engaged in extreme and outrageous conduct including, but not limited to:

a. By recklessly and intentionally creating or contributing to a hazardous condition that posed an extreme risk of harm to Plaintiff and others on the premises.

b. By failing to take any action to avert the collapse in spite of possessing the authority, capability, and wherewithal to do so.

65. Boomerang, CLP, and Olympia intentionally caused or recklessly disregarded the probability their conduct would cause severe emotional distress.

66. As a result of the intentional or reckless conduct on behalf of Boomerang, CLP, and Olympia, Plaintiff has suffered a severe and disabling emotional response to witnessing the death of his brother.

COUNT III – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(Defendant Hultgren Construction)

67. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

68. Hultgren Construction, through its agents, servants, and employees, committed negligence *per se* by performing demolition work on-site of the Project on the date of the collapse without first receiving permission from the City of Sioux Falls to do so.

69. Hultgren Construction owed Plaintiff a duty of providing a reasonably safe work place at the site of the Project, and Hultgren Construction breached its duty.

70. Hultgren Construction owed Plaintiff a duty to take reasonable precaution and to warn Plaintiff and others working on-site of the Project of the presence of a dangerous condition at the worksite, and Hultgren Construction breached its duty.

71. Hultgren Construction owed Plaintiff a duty to protect Plaintiff from witnessing the death of Plaintiff's brother caused by Hultgren Construction's negligence, and Hultgren Construction breached its duty.

72. As a direct and proximate result of the negligence of Hultgren Construction, Plaintiff suffered extreme emotional distress and harm from observing the death of his brother Ethan, with such harm manifesting itself in physical symptoms.

COUNT IV – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(Defendant Hultgren)

73. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

74. Hultgren owed Plaintiff a duty to take reasonable precaution and to warn Plaintiff and others working on-site of the Project of the presence of a dangerous condition at the worksite, and Hultgren breached his duty.

75. Hultgren owed Plaintiff a duty to protect Plaintiff from witnessing the death of Plaintiff's brother caused by Hultgren's negligence, and Hultgren breached his duty.

76. As a direct and proximate result of the negligence of Hultgren, Plaintiff suffered extreme emotional distress and harm from observing the death of his brother Ethan, with such harm manifesting itself in physical symptoms.

77. Legacy, CLP, Boomerang and Olympia are liable for Hultgren's conduct alleged herein.

COUNT V – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

(Defendant Hultgren)

78. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

79. Hultgren engaged in extreme and outrageous conduct including, but not limited to:

- a. By intentionally and recklessly ordering the continuation of demolition activities on-site of the Project without proper authority to do so.
- b. By intentionally and recklessly disregarding the presence of the large crack in the load-bearing common wall which posed an extreme risk of harm to those working on-site of the Project.
- c. By intentionally and recklessly ordering the continuation of demolition and construction activities on-site of the Project despite the knowledge of the worksite hazard and the danger that it posed.
- d. By intentionally and recklessly ordering the continuation of demolition and construction activities on-site of the Project despite the knowledge those working on-site would be unjustifiably exposed to an extreme workplace hazard.

e. By intentionally and recklessly carrying on a construction business under a trial-by-error mentality.

f. By allowing the collapse to occur in spite of having the knowledge and ability to prevent it.

80. Hultgren intentionally caused or recklessly disregarded the probability that his acts would cause severe emotional distress.

81. As a result of the intentional or reckless conduct on behalf of Hultgren, Plaintiff has suffered a severe and disabling emotional response to witnessing the death of his brother.

82. Legacy, CLP, Boomerang and Olympia are liable for Hultgren's conduct alleged herein.

COUNT VI – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(Defendant Legacy)

83. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

88. Legacy owed Plaintiff a duty to of care to select a competent construction contractor for the Project, and Legacy breached its duty.

89. Legacy owed Plaintiff a duty to take reasonable precaution and to warn Plaintiff and others working on-site of the Project of the presence of a dangerous condition at the worksite, and Legacy breached its duty.

90. Legacy owed Plaintiff a duty to protect Plaintiff from witnessing the death of Plaintiff's brother caused by Legacy's negligence, and Legacy breached its duty.

91. As a direct and proximate result of the negligence of Legacy, Plaintiff suffered extreme emotional distress and harm from observing the death of his brother Ethan, with such harm manifesting itself in physical symptoms.

COUNT VII – NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS

(Defendant RISE)

92. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

93. RISE owed Plaintiff a duty of care to provide its professional services with the skill and care ordinarily exercised by others in the engineering profession, and RISE breached its duty.

94. RISE owed Plaintiff a duty to take reasonable precaution and to warn Plaintiff and others working on-site of the Project of the presence of a dangerous condition at the worksite, and RISE breached its duty.

95. RISE owed Plaintiff a duty to protect him from witnessing the death of Plaintiff's brother caused by RISE's negligence, and RISE breached its duty.

96. As a direct and proximate result of the negligence of RISE, Plaintiff suffered extreme emotional distress and harm from observing the death of his brother Ethan, with such harm manifesting itself in physical symptoms.

COUNT VIII – BATTERY

(Defendants Legacy, Boomerang, Olympia and CLP)

97. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if set forth fully herein.

98. Legacy, Boomerang, Olympia and CLP knew or should have known of the presence of asbestos on the Project site.

99. Legacy, Boomerang, Olympia and CLP intentionally caused Plaintiff to be exposed to asbestos without his consent.

100. Plaintiff's exposure to asbestos was harmful and offensive.

101. As a result of Legacy, Boomerang, Olympia and CLP's conduct, Plaintiff was damaged in an amount to be proven at trial.

COUNT IX – NEGLIGENCE

(Defendants Legacy, Boomerang, Olympia and CLP)

102. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if set forth fully herein.

103. Legacy, Boomerang, Olympia and CLP knew or should have known of the presence of asbestos on the Project site.

104. Legacy, Boomerang, Olympia and CLP negligently caused Plaintiff to be exposed to asbestos without his consent.

105. As a result of Legacy, Boomerang, Olympia and CLP's conduct, Plaintiff was damaged in an amount to be proven at trial.

COUNT X – PUNITIVE DAMAGES

(Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction)

106. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

107. Defendants Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction have acted with an intentional and reckless disregard of Plaintiff's rights.

108. Defendants Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction intentionally, willfully, wantonly, and/or recklessly caused Plaintiff to suffer severe mental anguish and harm after witnessing the death of his brother during the collapse of the Project.

109. Plaintiff is therefore entitled to punitive damages from Defendants Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction in an amount to be determined at trial.

COUNT XI – PIERCING THE CORPORATE VEIL

(Defendants Legacy and Hultgren Construction)

110. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

111. On information and belief, Hultgren Construction acted at all relevant times as the alter ego of Legacy.

112. Hultgren Construction has claimed it lacks the financial resources to pay fines levied against it by OSHA and by the South Dakota Department of Environment and Natural Resources.

113. Hultgren Construction was grossly undercapitalized.

114. It is just and equitable that the assets and property of Legacy be made available to satisfy the debts of Hultgren Construction.

115. If the assets of Legacy are insufficient to satisfy the debts of Legacy and Legacy Construction, it is just and equitable that the individual owners of Legacy be held responsible for its debts.

COUNT XII – FRAUDULENT TRANSFER (SDCL 54-8A-1, et seq.)

(Defendant Boomerang)

116. Plaintiff re-alleges the foregoing paragraphs of this Complaint and hereby incorporates them by reference as if fully set forth herein.

117. On information and belief, Boomerang has recently received significant insurance proceeds as a result of the building collapse described above.

118. On information and belief, the claims against Boomerang arising out of the building collapse are sufficient to render Boomerang insolvent.

119. Plaintiff is a creditor of Boomerang.

120. Pursuant to SDCL 54-8A-7(3), Plaintiff seeks an injunction against all further disposition of assets by Boomerang.

121. To the extent assets have been transferred out of Boomerang for less than equivalent value since December 2, 2016, Plaintiff seeks to avoid and claw back all such transfers pursuant to SDCL 54-8A-7(1) to the extent necessary to satisfy Plaintiff's claim.

WHEREFORE, Plaintiff prays that the Court enter judgment in favor of Plaintiff and against Defendants as follows:

- a. Judgment against Defendants, joint and severally, for general damages in an amount to be determined at trial.
- b. Judgment against Defendants, joint and severally, for special damages in an amount to be determined at trial.
- c. For punitive damages against Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction.
- d. For injunctive relief as requested herein;
- e. For Plaintiff's costs and disbursements herein.
- f. For prejudgment interest.

g. For such other, further, and different relief as the Court deems just and equitable.

PLAINTIFF DEMANDS A TRIAL BY JURY

Dated at Sioux Falls, South Dakota, this 5th day of March, 2018.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Vince M. Roche

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